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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

DEMETRIUS PHILLIPIDES,
Petitioner,

vs.

BENJAMIN M. DAY, Commissioner of Immigration,
Port of New York,
Respondent.

PETITIONER'S BRIEF

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DEMETRIUS PHILLIPIDES, Petitioner, *vs.* BENJAMIN M. DAY, Commissioner of Immigration, Port of New York, Respondent.	No. 92.

PETITIONER'S BRIEF.

Statement.

The petitioner was arrested in the City of Long Beach, Nassau County, New York, on December 18th, 1928, under a warrant of the Department of Labor, charging him with having been "found in the United States in violation of the Immigration Act of May 26, 1924," in that "he has remained in the United States for a longer time than permitted under the said act or regulations thereunder."

The evidence is undisputed that the petitioner is a native of Greece; that he shipped from Piraeus, Greece, on or about August 20th, 1925, on board the steamship *Byron*, as a seaman, arriving at the Port of New York September 10th, 1925; that he then and there *deserted* from the said ship, and was arrested on the warrant, as aforesaid, three years and three months later.

On April 15th, 1929, the petitioner sued out a writ of *habeas corpus* in the United States District Court for the Southern District of New York, contending that Section 34 of the Immigration Act of 1917 (Ch. 29, 39 Stat. 874) was in effect a statute of limitation which would bar his deportation after the passage of three years from the date of his entry.

The writ was dismissed on May 10th, 1929, upon the authority of *U. S. ex rel. Rios* vs. *Day*, 24 F. (2d) 654. An appeal from the order dismissing the writ was taken to the United States Circuit Court of Appeals for the Second Circuit. That Court in a *per curiam* opinion affirmed the order of the District Court upon the sole authority of *U. S. ex rel. Piccolella* vs. *Commissioners*, 36 F. (2d) 1022, which in turn was decided solely upon the authority of the *Rios* case, *supra*.

Petitioner now comes before this Court by virtue of a writ of certiorari granted on May 26, 1930.

Question Involved.

The instant case involves only one question of law:

Does Section 34 of the Immigration Act of 1917 bar the deportation of seamen who have unlawfully entered this country subsequent to 1924, and have remained here for a period of more than three years before being apprehended?

Statute Involved.

Section 34 of the Immigration Act of 1917 provides:

> "That any alien seaman who shall land in a port of the United States contrary to the provisions of this Act shall be deemed to be unlawfully in the

United States, and shall, at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody and brought before a board of special inquiry for examination as to his qualifications for admission to the United States, and if not admitted said alien seaman shall be deported at the expense of the appropriation for this Act as provided in section twenty of this Act."

ARGUMENT.

POINT I.

Since petitioner, an alien seaman unlawfully in the United States, was not taken into custody within the three year period of limitation specified in Section 34 of the Immigration Act of 1917, he is, therefore, exempt from deportation, because the provisions of this section are in effect a statute of limitation.

Petitioner shipped from Piraeus, Greece, as a common seaman aboard the S. S. *Byron* and deserted his ship on September 10, 1925, immediately on its arrival in the Port of New York. He was taken into custody on December 18, 1928, more than three years after the date of his unlawful entry.

In *U. S. ex rel. Danikas* vs. *Day*, 20 F. (2d) 733 (C. C. A., Second Circuit), referring to Section 34 of the Immigration Act of 1917, Judge Augustus N. Hand, said, at page 735:

> "This section, naturally read, would seem to require the Secretary of Labor to arrest a seaman within three years after unlawfully landing in the country, if he sought to deport him; * * *"

and further, in the same case, at page 736, the Court said:

> "Section 34 is much plainer, for it says nothing about the institution of proceedings, but provides that 'any alien seaman who shall land in a port of the United States contrary to the provisions of this act * * * and shall at any time within three years thereafter, upon the warrant of the Secretary of Labor, be taken into custody, * * * shall be deported'.
>
> *This, by the plainest language, makes the taking 'into custody'* within three years from landing the critical factor." (Italics ours.)

It was held further in *U. S. ex rel. Filippini* vs. *Day,* 18 F. (2d) 781, District Court, S. D., New York, December 3rd, 1926, that:

> "It is now the arrest which counts, and not the date of the issue of warrant or the time of the actual deportation."

Even in *U. S. ex rel. Rios* vs. *Day,* 20 F. (2d) 654, which is the basic case in the Second Circuit for the ruling that seamen claiming protection under Section 34, Act of 1917, may be deported under the provisions of Section 14, Act of 1924, Judge Manton, writing for a unanimous court, recognized the fact that a seaman could not be deported any time, and that the date of last entry

> " * * * controls the limitation as to when he may be deported",

and further held that the time limitation starts to run from the date of last entry.

The petitioner, therefore, submits that as the undisputed evidence shows that he was not taken into custody until more than three years after his arrival in the United

States, the Secretary of Labor is prohibited by the limitation contained in Section 34 of the Act of 1917, from subjecting him to deportation proceedings.

The law is well settled as to the application of Section 34 of the Immigration Act of 1917 to seamen.

POINT II.

Section 34 of the Act of 1917 creates a special class in favor of seamen.

The unanimous Court in *Nagle* vs. *Hansen,* C. C. A. 9th Circuit, 17 F. (2d) 557, dealing directly with this point said:

> "The general provisions in the 1924 act that aliens, who have entered unlawfully or remained illegally at any time after entering the United States shall be taken into custody and deported, is inconsistent with the provisions of section 34 of the act of 1917, and would suggest a repeal of the latter by implication; unless section 34 may be said to create a special class, subject to special different treatment. And, considering it in the relation it bears to other provisions of the act of 1917, we think it does create a special limitation, in favor of seamen as a class, which is not repealed by the 1924 act. The act of 1917 contained a general provision (Sec. 19) governing the deportation of aliens, the provision common to those who entered while belonging to excluded classes being that they might be deported within five years after entry. That this provision, as it affects all aliens not within the admissible classes, was repealed by section 14 of the act of 1924 is clear enough. That repeal, however, in reason and relation, does not effect the special conditions separately expressed in section 34 of the 1917 law."

The theory that Section 34, Act of 1917, creates a special class in favor of seamen is also held in *Rodgers* vs. *U. S.*, 185 U. S. 83, and *Carr* vs. *Zaja*, 38 F. (2d) 1016.

POINT III.

Section 14 of the Immigration Act of 1924 has no application to alien seamen.

The Commissioner of Immigration, in support of his alleged right to deport petitioner, relies on the questionable authority of Section 14 of the Immigration Act of 1924, which reads as follows:

> "Any alien, who at any time after entering the United States is found to have been at the time of entry not entitled under the Act to enter the United States, or to have remained therein for a longer period than permitted under the Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in Sections 19 and 20 of the Immigration Act of 1917. Provided, that the Secretary of Labor may, under such conditions and restrictions as to the support and care as he may deem necessary, permit permanently to remain in the United States any alien child who when under 16 years of age, was heretofore temporarily admitted to the United States, and who is now within the United States and either of whose parents is a citizen of the United States" (43 Stat. L. 162).

It is the contention of the petitioner that Section 14 has no application to alien seamen.

A reading of the Immigration Act of 1924 shows that it makes specific reference to "Immigrants, quota and non-

quota" (such term or terms being used in Sections 2 and 10 inclusive, and Sections 11, 12, 13, 16 and 18), to "aliens" (in Sections 3, 10, 14 and 15) and to "alien seamen" (in Sections 3 and 19) thereby creating by actual and specific reference three separate and distinct classes of individuals, viz.: (1) "immigrants", (2) "aliens", and (3) "alien seamen", and a certain, definite method of control and disposal is provided in the said Act for each class.

Inasmuch as petitioner does not claim to come within the category of an "immigrant" no argument need be advanced in opposition to those sections of the Act which relate to that class.

In connection with the second class, "aliens", the petitioner directs attention to the fact that the act provides for the entry of an alien (Sect. 3, Subdivs. 2, 3, 4 and 6), for the re-entry (Section 10), for deportation (Section 14), and for the maintenance of the exempt status provided in Section 3 (Section 15).

It would appear that Congress intended thereby to effect the control and regulation of "aliens" by these sections, and that these sections were directed to this particular class and to no other.

Apparently Congress thought it necessary to include in the Act of 1924, sections that would specifically refer to, and actually restrict, limit and control the third class "alien seaman", and it did so by Subdivision 5 of Section 3 (providing for the maintenance of the status of a bona fide seaman), Section 15 (providing for admission under a bond), Section 19 (prohibiting landing except in case of sickness or under Departmental regulations).

Section 19 even goes further and expressly gives to the Secretary of Labor the right and the power to prescribe rules and regulations "for the ultimate departure, removal,

or deportation of such alien [alien seaman] from the United States'' as shall have been permitted to land temporarily in order to reship foreign or for medical treatment.

The wording of this section appears to be perfectly clear, but in view of the conflicting opinions in connection with Section 14 created by the decisions of the Circuit Court of Appeals for the Second Circuit, and its alleged applicability to the third class, ''alien seamen'', notwithstanding the wording of Section 19, it appears that this is a situation where ''reference may be had to the reports of legislative committees to ascertain the purpose of Congress in adopting the Statute'' (*Church of the Holy Trinity* vs. *United States*, 143 U. S. 457).

While debates in Congress are not generally appropriate sources of information to discover the meaning of a statute (*Dunlay* vs. *United States*, 173 U. S. 65) the Supreme Court has considered explanatory statements made by members in charge of bills (*United States* vs. *St. Paul, Minn. and Manitoba R. C.*, 247 U. S. 310; *Wisconsin R. Comm.* vs. *C. B. & A. R. Co.*, 257 U. S. 563). The meaning of a statute is often to be sought from the surrounding circumstances and preceding history (*Guarantee Ins. Trust & S. D. Co.* vs. *Gellers*, 123 U. S. 276; *Prestons Browder*, 1 Wheat. 115; *U. S.* vs. *U. P. R. Co.*, 9 U. S. 72). The reports of a committee, including the bill as introduced, changes made in the frame of the bill during the course of its passage, and statements made by the Committee Chairman in charge of it, may be resorted to under proper qualifications (*U. S.* vs. *St. Paul Ry. Co.*, 247 U. S. 310; *Ozawa* vs. *U. S.*, 260 U. S. 178, 194; *Roberts* vs. *Southern Pac. Co.*, 186 Fed. 934).

Legislative History of the Act of 1924.

Before the passage of the 1924 act numerous concerted efforts had been made in the House of Representatives to curtail the rights of seamen. As early as December 31st, 1923, the Department of Labor submitted a proposed immigration act to Congressman Albert Johnson, Chairman of the House Committee on Immigration (68th Congress, 1st Session, Hearings before House Committee on Immigration and Naturalization, Serial 1A, pp. 551-565). That bill contained the provisions embodied in the House proposals for landing cards and for the repeal not only of Section 32 of the Act of 1917, which was subsequently repealed, but of Sections 33 and 34 as well.

Both of these suggestions were embodied in the Johnson bill (H. R. 7995) as reported in House Report No. 350 (68th Congress, 1st Session, March 24, 1924, see pp. 19 ff.), which stated that:

> "Enforcement of the sections (Secs. 32, 33, and 34) of the Immigration Act of 1917 respecting alien seamen has been one of the most difficult tasks confronting the Immigration Service" (p. 19).

Both provisions remained in the bill through the conference report of May 8, 1924.[1] Not until May 15th does

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[1] 68th Congress, 1st Session, H. Reprt. 688. The bill in its then form, less than three weeks before it was signed by the President, contained a Section 21 (d): "*Section 32 of the Immigration Act of 1917 is repealed*, but shall remain in force as to all vessels, their owners, agents, consignees and masters, and as to all seamen, arriving in the United States prior to the enactment of this act. *Sections 33 and 34 of such act are repealed*, to take effect after the expiration of four months after the enactment of this act, but the provisions of such Section 34 shall thereafter remain in force in the case of any alien seaman who has landed in a port of the United States before such repeal became effective." (Italics ours.)

the conference bill (Conference Committee, print No. 1) apparently lose the provision directly repealing Section 34.

The Senate had opposed making any changes in the law in so far as it affected seamen. To quote the statement of Senator Lodge, made on April 18, 1924, "The House passed the bill with certain clauses in it relating to alien seamen. Those were stricken out by the Senate" (Congressional Record, 68th Congress, 1st Session, p. 6641).

It became necessary, as the two houses could not agree upon the question of alien seamen, to have a conference committee. Senator King sought strenuously to include in the Senate bill to be presented to the conference committee an amendment which contained an express provision for the deportation of seamen who remained more than sixty days unless they could show they had not abandoned their status or were admissible as immigrants (Sec. 17c to S. 2576, Congressional Record, 68th Congress, 1st Session, p. 6636). The amendment was debated and thereafter defeated (p. 6642), nor was there any suggestion that it was already embodied in the provisions of the bill. Senator Reed, the Chairman of the Senate Committee on Immigration, and later Chairman of the Conference Committee (*idem*, p. 8235), suggested that the alien seamen question "ought to be dealt with in a separate bill" (*idem*, p. 6645). The whole matter was left as an open question for the Conference Committee. On May 15th the bill was agreed upon by both houses.

Senator Reed and Congressman Johnson explained what has been done about alien seamen to their respective houses. Both were agreed on two propositions with reference to the seamen's provisions:

(1) That they made it possible to keep sick seamen aboard the boats.

Senator Reed said:

> "All that we have done to the alien seaman law that is new has been to provide that after the inspection of alien seamen by the immigration authorities—and that inspection is required under the present law, and there is nothing new about that—the shipowner or master must keep on board any seaman who is indicated by the immigration inspector as unfit to land" (*idem*, p. 8577).

Congressman Johnson expressed the same thought thus:

> "In reference to the alien seamen's provisions, let me give you an exact statement of its purpose. It will work fairly for the United States and fairly for the sailors of the world. Seamen cannot now be held on board ship even long enough to give them the medical examination necessary for the protection of the United States. We correct that situation" (*idem*, p. 8651).

(2) That Section 19 applied only to excludable seamen such as those from the barred zone.

Senator Reed's views appear in a dialogue between himself and Mr. Fletcher:

> "Mr. Fletcher: It seems to me there might be some question, by reason of the provisions of Section 19 and Section 3, as to whether there is any change in the matter of alien seamen. This is the provision in Section 3, that the word 'immigrant' does not include 'a bona fide alien seaman serving as such on a vessel arriving at a port of the United States'. He is not an immigrant. Then Section 19 provides that 'No alien seamen excluded from admission into the United States under the immigration laws', can do so and so. If he is not an immigrant, is he excluded under the immigration law?

Mr. Reed of Pennsylvania: Yes, Mr. President. There are a great many people, several hundred million of them, who are not immigrants, but who are excluded from admission under the immigration laws. In other words, the immigration laws prescribe who shall be immigrants, and forbid the admission of millions of others, including all the Chinese, the Hindus, and the Malays.

Mr. Fletcher: Then the Senator's contention is that the able seamen on these vessels, although not immigrants, are excluded under our immigration laws?

Mr. Reed of Pennsylvania: Yes, under certain conditions they are.

Mr. Fletcher: Under certain conditions; and they are taken care of under Sections 19 and 20 of the committee report?

Mr. Reed of Pennsylvania: Precisely. They can be admitted temporarily under regulations, and that is a humane thing, because a Chinese ship coming into our ports with a Chinese crew should not be made a jail while it is in port" (*idem*, p. 8578).

Mr. Johnson states the proposition thus:

"It is charged that Section 19 places the alien seamen under the immigration laws, and that to come ashore these seamen will have to comply with all the provisions of the immigration laws and be eligible to citizenship.

"There is nothing in that charge. The provision excluding from admission aliens ineligible to citizenship by its own terms does not apply to any alien who is not an immigrant as defined in Section 3. By the terms of Section 3, bona fide seamen are expressly declared not to be immigrants. Therefore seamen are not prevented from landing under the Japanese-Exclusion provision" (*idem*, p. 8651).

Mr. Johnson had previously—in answer to an inquiry as to the effect of Section 19—stated his views in these unmistakable terms:

> "I want to make it just as clear as I can that the provision the gentleman has just read only applies to those who cannot enter the United States, such as anarchists, and others who are in the excludable classes of Section 3 of the Act of 1917" (*idem*, p. 8638).

It is quite apparent that the Senate conferees had refused to agree to the bill unless the repeal of Section 34 of the 1917 Act was dropped. It was, as we have said, finally left out in the bill as it appears under date of May 15, 1924. Presumably the only effect of not repealing Section 34 was to retain the special status of seamen, including the three-year limitation in deportation proceedings of which the Circuit Court of Appeals has deprived them by its decision in the instant case. Throughout the extended debate on the seamen's provisions, as well as in the statements on the conference report which Senator Reed and Congressman Johnson made, Section 14 of the 1924 Act was never once mentioned. There does not appear to be any doubt that no one regarded Section 14 as applicable to seamen or as having any effect on their situation.

Since the 1924 Immigration Act, Congressman Johnson has made a number of efforts to obtain the repeal of Section 34 upon the ground that it unwarrantedly makes a privileged class of seamen. Thus as recently as the first session of the 70th Congress the House Committee on Immigration and Naturalization reported favorably H. R. 10078, containing certain additional provisions for the deportation of aliens. In House Report No. 484, to accompany the bill, Congressman Johnson, writing for the

committee, had this to say of Section 34 of the basic Act more than four years after the passage of the 1924 Act:

> "It will be noticed that this section (1) places a statute of limitation of three years from the time of landing upon the deportation of alien seamen, (2) affords a seaman a right to be heard before a board of special inquiry, and (3) apparently allows his admission unless he is at the time of such hearing a member of one of the excluded classes. No reason was apparent to your committee why a seaman should be granted any of these privileges, which are not granted to any other class of aliens, and it is therefore provided in the bill (subd. (b) of Sec. 7) that this section be repealed. The effect of this repeal will be to place the seamen upon the same plane as any other alien so far as the procedure in arrest and deportation cases is concerned" (p. 13).

This is not an inadvertent statement, for he used substantially the same argument in his efforts to put through the deportation bills of the previous Congresses (69th Congress, 1st Session, House Report 991, pp. 12-13, to accompany H. R. 11489; 68th Congress, 2nd Session, House Report 1292, pp. 14-15, to accompany H. R. 11796). His efforts during both sessions failed.

It would appear, therefore, that Representative Johnson, whose reputation as an expert on immigration, and the laws that govern and control it, and the man to whom the Department of Labor turns when it desires to effect changes in the Immigration Laws, is of the opinion even today that Section 34 of the Act of 1917 was not affected by any part of the Act of 1924, and that it is still in full force and effect.

It is well to note the fact that Mr. Johnson was the Chairman of the House Committee in the preparation of the bill which became Immigration Act of 1924.

POINT IV.

Section 34 of the Act of 1917 apparently applies only to alien seamen unlawfully in the United States.

It would seem, to petitioner, from the few cases on the point in question that most of the instances coming before the Court related to seamen who have stayed after lawful entry beyond the time limit provided by the Immigration Rules, and that the Courts, therefore, have felt that they did not come within the limitation provided in Section 34, Act of 1917.

The language of the Section is simple and unambiguous. It says in part:

> "That any alien seaman who shall land in a port of the United States, contrary to the provisions of this act shall be deemed to be unlawfully in the United States, and shall at any time within three years thereafter * * * be deported * * *."

This language undoubtedly means what it says. It refers to the provisions of the Act which provide for the lawful entry of alien seamen, such as

1. For a limited period to reship foreign.
2. For medical treatment.

and then continues to say clearly that a seaman landing for any other purpose "shall be deemed to be unlawfully in the United States."

The unlawful entry by petitioner is unquestioned. The Transcript of Record, page 10, folio 16, reads, in part, as follows:

"Result of Medical examination (State finding): not certified."

* * * * * *

"Passport Status: Alien has no passport."

and at page 14, folio 21, the following examination took place, before the Immigration Inspector in charge of the hearing:

"Q. At the time of your entry at the Port of New York, September 10, 1925, did you desert the S. S. *Byron*, or did you remain a member of the same?"

"A. I left the ship and went to New York."

* * * * * *

"Q. At the time of your entry, were you in possession of an unexpired immigration visa issued by an American Consul?"

"A. No."

In the official report of the inspector, containing his recommendations (Transcript of Record, page 16, fol. 24, and 25) he affirmatively finds that petitioner arrived at the Port of New York as a member of the crew of the S. S. *Byron*, on September 10, 1925, and *deserted*. The record further shows that petitioner was reported by the ship's owners on September 25, 1925, as being a *deserter*, and no proof at all of the payment of any head tax.

What clearer and stronger evidence could there be than the direct admission by petitioner that he *deserted* his ship, the report of the ship's owners that he was a *deserter*, the failure to submit to a medical examination and the failure to secure permission for temporary landing. There is no evidence that he ever received permission to land from anyone or for any purpose. The absence of a medical cer-

tificate is an unanswerable argument to the unlawfulness of petitioner's entry in view of the strict ruling requiring medical examination of every seaman before even "shore leave" is granted.

Throughout the argument of this case, first in the District Court for the Southern District of New York, and then in the Circuit Court of Appeals for the Second Circuit, and finally on the application for a writ of certiorari before this Court, petitioner has consistently contended that he was a *deserter*, and affirmatively admitted throughout the case that he was as a consequence "unlawfully in the United States". At no time in any of the various arguments in opposition to petitioner, or in any of the briefs filed by the United States attorney, was the claim made that there was a lawful entry on the part of petitioner. As a matter of fact the Government attorney quite willingly admitted and conceded the *desertion* of petitioner and his unlawful entry, apparently resting his case solely upon the decision in the *Rios* case and not bothering particularly about the facts relating to the entry of petitioner into the United States. After the consideration of this case even the Circuit Court of Appeals, for the Second Circuit, affirmatively found that petitioner was a "*deserter*" (Transcript of Record, page 21, folio 36).

It would appear that while there does not seem to be any decision directly in point, the inference to be drawn from the opinions in cases somewhat analogous, is to the effect that the real test lies in the answer to the question of "whether the entry was lawful or unlawful", and if unlawful, then Section 34 protects the seaman from deportation.

In a recent case in the District Court of the United States, for the Southern District of New York, *Cellamare vs. Day*, 32 F. (2d) 623, Judge Thacher said:

> "* * * The limitation contained in Section 34 of the Immigration Act of 1917 can have no application because in terms it applies only to alien seamen whose landing was contrary to the Act of 1917."

and in *Ex Parte Bildt*, 32 F. (2d) 984, it was said by the Court, after quoting Section 34, Act of 1917, as follows:

> "The difficulty of application arises out of the fact that the initial 'landing' of the appellant was not unlawful but pursuant to permission duly given by the immigration officials. But, if we assume its applicability during the sixty days covered by the permit the Immigration service had no right to proceed against him. His 'landing' became unlawful only upon the termination of the period, and hence it must be held that the period prescribed by it did not commence to run until September 30, 1925, less than three years prior to his arrest for deportation."

In *Zurbrick* vs. *Traicoff*, 38 F. (2d) 811, the Court (U. S. Circuit Court of Appeals, Sixth Circuit) said:

> "Indeed Section 34 of the Act of 1917 by its terms is limited to alien seamen who 'land' in the United States contrary to the provisions of that act, and does not in our opinion apply to alien seamen temporarily admitted under regulations pursuant to section 19 of the act of 1924, and who remain in this country beyond the time therein allowed."

POINT V.

Congress utilized in the Act of 1924 a certain definite method of repeal and modification.

The argument of the Government in the lower courts was to the effect that Section 34 of the Act of 1917 was repealed by the Act of 1924.

The petitioner contends that there is nothing inconsistent in the Act of 1924 with the provisions of Section 34 of the Act of 1917, and that the later Act neither expressly nor by implication repealed or superseded the earlier act.

The purpose of Congress in the enactment of the Immigration Act of 1924 is distinctly shown in Section 25 thereof, where it says:

> "The provisions of this act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this act."

In the Act of 1924 the framers utilized a particular method of changing, modifying or repealing sections of the Act of 1917. This method was by actual reference to specific sections to be amended or repealed.

This was done in the following instances:

> Act of 1924; Sect. 20, Subdiv. d: "Section 32 of the Act of 1917 is repealed * * *."
>
> Act of 1924; Sect. 26: "Section 9 of the immigration act of 1917 is amended to read as follows: '* * *.'"

Act of 1924; Sect. 27: "Section 10 of the immigration act of 1917 is amended to read as follows: '* * *.'"

The obvious conclusion to be drawn from the method used is that if Congress desired to repeal so important a provision as Section 34 of the Act of 1917, it would have followed a similar procedure and have done so by actual reference, as in the instances cited. This conclusion is further strengthened by the terms of Section 25 of the Act, wherein attention is called to the fact, and the warning issued that:

> "The provisions of this act are in addition to and not in substitution for the provisions of the immigration laws * * *."

As the Court well knows, the ordinary rules of statutory construction establish that Section 34 of the Act of 1917 is still in full force and effect. As indicated in the foregoing, it is apparent that there is no express repeal. Under the familiar rule of statutory construction appellant submits that a later statute will not repeal a prior statute unless they are clearly inconsistent and cannot be reconciled. Such is not the case here. The Immigration Act of 1917 is the basic immigration law of the land. The Act of 1924 does practically nothing but add quota and visa provisions to the prior act. Section 34 of the Act of 1917 deals with a certain, definite, special class, while Section 14 of the Act of 1924 is a general Statute and does not apply to the Special Class created by the Act of 1917.

POINT VI.

The construction placed on Section 34 of the Immigration Act of 1917 by the Department of Labor is entitled to great weight.

Where there is ambiguity in the meaning or application of a statute, as there apparently is in Section 14 of the Act of 1924, the practical construction placed upon it by those whose duty it was to carry it into execution is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it is clear that such construction is erroneous.

After the passage of the Immigration Act of 1924, the United States Department of Labor, Bureau of Immigration, having the duty to carry the law into execution, caused the "Immigration Laws" to be printed by the Government Printing Office at Washington, for the information and guidance of its own agents and the general public, and it included in the printing of the Act of 1917, without change or comment, Section 34, proving conclusively that it was the opinion of the Immigration experts in that department that no part of the Act of 1924 changed or modified Section 34, Act of 1917 in any respect.

In 1927, when the Department of Labor again caused the Immigration Laws to be officially printed in book form, the Department again included Section 34 of the Act of 1917, without change or comment, and this was after the Department had had three years in which to study the application of the Act of 1924, and to observe its enforcement, effect and judicial interpretation, and notwithstanding the decisions of the Circuit Court of Appeals, for the Second Circuit.

At that time, the Department even went so far as to include in the printed book of that year, the official publication of the Department, the "Rules of March 1, 1927". Among those rules is quoted below, in part, Subdivision I, paragraph 1, of Rule 6, relating specifically to Section 34, Act of 1917, containing the regulations and instructions covering the "arrest and deportation of alien seamen", as follows:

> "Any alien who shall come to a United States Port as a seaman and land in the United States otherwise than in pursuance of and in accordance with the provisions of the Act of February 5, 1917, shall be arrested, as provided in Section 34 of said Act, whenever and wherever found in this country within three years from the date of landing."

As this rule is still in effect, it is apparent that the opinion of the experts on immigration in the Department of Labor in relation to the applicability of Section 34, Act of 1917, notwithstanding the provisions of Section 14, Act of 1924, to alien seamen unlawfully entering the United States, and remaining for more than three years, remains unchanged.

It is also well to note that the Department of Labor, with each Congress, following 1924, has endeavored to have the Act of 1924 amended so as specifically to repeal Section 34 of the Act of 1917, but without success (see pp. 12 and 13, *ante*).

It might be noted also that the compilers of the United States Code, United States Code Annotated, and the various Digests of Federal Laws, have without exception included Section 34, Act of 1917, as an inseparable part of the Immigration Laws of the United States.

POINT VII.

Since the decision in the instant case, the Circuit Court of Appeals for the Second Circuit has reversed its interpretation of the statute in question.

In all of the cases heretofore argued before the Circuit Court of Appeals, for the Second Circuit, principally *Piccollela* vs. *Day*, 36 F. (2d) 1022; *U. S. ex rel. Phillipides* vs. *Day*, 37 F. (2d) 1015; and *U. S. ex rel. Rios* vs. *Day*, 24 F. (2d) 654, the court had consistently held that Section 34 of the Act of 1917 was inapplicable to a situation such as arises in the instant case.

In a recent opinion, however, by Learned Hand, Circuit Judge, writing for a unanimous court, in the case of *U. S. ex rel. Anastasios Cateches* vs. *Day* (decided in December, 1930 and unreported as yet), the court admitted that they were concluded in the cases cited above from holding that Section 34 of the Act of 1917 was applicable to this situation because of their previous contrary holding in *U. S. ex rel. Danikas* vs. *Day*.

The court further specifically stated that there had been no repeal by the Act of 1924 of Section 34 of the Act of 1917. And further:

> "Thus we must construe section 34 of the Act of 1917 as still in force so far as it does not clash with any provisions of the Act of 1924."

and further in the opinion says:

> "As there has been no repeal by the Act of 1924 section 34 may remain 'applicable' to some of the cases which it covers, and not the rest, and we must determine where the case at bar lies."

There is no holding whatever that there is any such clash. It will be noted that the court admits and recognizes, however reluctantly, the continuing effectiveness of Section 34 of the Act of 1917.

In the *Anastasios Cateches* case from which the above references are taken, the Court, in order to void the writ of habeas corpus and effect the deportation of that petitioner, rather than admit definitely and conclusively their error in previous cases, through a circuitous method of reasoning, found that Cateches "landed lawfully" when his ship docked at New York, and that after his "lawful landing" formed an intention to desert and probably did desert. The Court reasons, therefore, that as the landing was lawful, his subsequent desertion was of no effect, that he was amenable to the terms of Section 14 of the Act of 1924 and was deportable because he had overstayed his leave.

In the instant case there is no evidence of even such a "lawful landing.". The entry record admits the *desertion.* The natural inference to be drawn, therefore, is that were this case to be reheard by the Circuit Court from which it came, that Court could only find that petitioner would be protected from deportation because of the terms of Section 34 of the Act of 1917. Such a holding, in view of the present attitude of this Court, as expressed in the Cateches case, would be inescapable.

POINT VIII.

The admissions contained in the decision in the Cateches case destroy the conflict between the Circuit Courts of Appeal for the Second and Ninth Circuits.

Heretofore the Circuit Court of Appeals for the Second Circuit has consistently held that Section 34 of the Act of 1917 was repealed by implication drawn from the provisions of Section 14 of the Act of 1924.

The case which has caused the misconstruction was *Rios* vs. *Day*, 24 F. (2d) 654, where the Court *in dictum* specifically declared the repeal of Section 34 of the Act of 1917 by Section 14 of the Act of 1924, although Section 34 had no application whatever, in view of the fact that Rios was apprehended within three years from the date of his landing, and further because of the fact that the landing was lawful.

This case was followed by *Cellamare* vs. *Day*, 32 F. (2d) 623; *Ex Parte Bildt*, 32 F. (2d) 892; *Picollela* vs. *Day*, 36 F. (2d) 1022, and *Zurbrich* vs. *Traicoff*, 38 F. (2d) 811, in each of which cases the landing was a legal landing.

In the Ninth Circuit, however, the Court held, in *Nagle* vs. *Hansen*, 17 F. (2d) 557, that there was no repeal by Section 14, Act of 1924, of Section 34, Act of 1917. The facts in this case required a direct answer to the question, and the Court answered it squarely by holding that there was no repeal.

This case was followed by a like decision in the same Circuit in *Carr* vs. *Zaja*, 38 F. (2d) 1016.

With exception of the instant case, these two latter cases are the only reported cases where the question of the applicability of Section 34, Act of 1917, is directly in point.

As previously pointed out, the cases in the Second Circuit do not come under the protective provisions of Section 34, Act of 1917, either because of the lawful landing or the fact that the three year period of limitation had not expired.

In the instant case, petitioner comes squarely within the holding of *Nagle* vs. *Hansen* and *Carr* vs. *Zaja* (in the Ninth Circuit) and the dicta of *Cateches* vs. *Day* (in the Second Circuit) in that:

1. Petitioner is an alien seaman.
2. His landing was unlawful.
3. He was not taken into custody within three years.

Therefore, by reason of the provisions of Section 34, Immigration Act of 1917, petitioner cannot be deported.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment affirming the dismissal of the writ of habeas corpus and remanding petitioner to the custody of the Commissioner of Immigration should be reversed.

Respectfully submitted,

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